

use of the abbreviation TDD as a multiple access technique indicates either a complete misunderstanding of both the Omnipoint system and the applicable technology or gross inattention to the details of Omnipoint's operations. If the Commission can make such an obvious mistake concerning one of the fundamental aspects of the Omnipoint system, it cannot assert that it has thoroughly examined the Omnipoint technology and properly determined that Omnipoint deserves a pioneer's preference.

Additionally, the Commission attributes qualities to the Omnipoint system that even Omnipoint does not. The Commission states that "in PP-58 Omnipoint requests a preference for developing 2 GHz spread spectrum equipment that it demonstrated to be capable of being used to provide voice, data and PCS video services."^{69/} This statement is wrong on two counts. First, Omnipoint never made any such claim in PP-58. Second, neither Omnipoint nor anyone else has demonstrated that the Omnipoint system is capable of being used for anything other than voice.

QUALCOMM also notes the Commission's impermissible reliance on the Omnipoint Semi-Annual Experimental License Progress Report dated August 1993,^{70/} which was the subject of a QUALCOMM motion to strike.^{71/} QUALCOMM informed the Commission that it believed the Progress Report constituted a prohibited *ex parte* presentation as well as an untimely pleading in the pioneer's preference component of GEN Docket 90-314. The *Third Report and Order* did not address QUALCOMM's motion, but did rely on Omnipoint's Progress Report.^{72/} That progress report was not only a report of Omnipoint's tests; it was an exercise in advocacy in which Omnipoint unfairly and incorrectly criticized the QUALCOMM CDMA system. The courts have insisted that:

^{69/} *Id.* at ¶ 63.

^{70/} *Id.* at ¶ 56 n.68.

^{71/} See QUALCOMM Motion to Strike Omnipoint Semi-Annual Experimental License Progress Report, GEN Docket No. 90-314 (Sept. 15, 1993).

^{72/} *Third Report and Order* at ¶56 n.68.

information in agency files or consultant's reports which the agency has identified as relevant to the proceeding be disclosed to the parties for adversarial comment.^{73/}

The Commission's cavalier disregard for the requirements of its own *ex parte* rules, as well as its failure to maintain even minimal procedural standards for the functioning of agency decision-making and judicial review, make reconsideration of the *Third Report and Order* a necessity.

C. Grant of a Preference to Omnipoint Undermines the Policies Behind the Pioneer's Preference Rules

The grant of a preference to Omnipoint undermines the policies which the Commission sought to foster through the creation of the pioneer's preference rules and makes it difficult, if not impossible, to assure compliance with the *Third Report and Order*. The rules are structured to promote the disclosure of innovative ideas and developments in order to foster the implementation of new services. In return for disclosing proprietary information, the otherwise qualified innovator is given an automatic right to obtain a license for the new service. Here, Omnipoint has failed to disclose many of the key elements of its proposed technology, undermining the justification for awarding Omnipoint a preference.^{74/}

Although Omnipoint has filed voluminous pleadings and reports with the Commission, Omnipoint has repeatedly refused to reveal some of the most critical details of its PCS system.^{75/}

^{73/} *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977); *U.S. Lines v. Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978); *Portland Cement Ass'n v. Ruchelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

^{74/} In the *Notice of Proposed Rule Making* considering the proposal to create a pioneer's preference, the Commission recognized that innovators were hesitant to reveal the technology underlying their proposals because the Commission's rules provided little guarantee that the innovator would subsequently receive a license to provide the service. See *Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services*, GEN Docket No. 90-217, 5 FCC Rcd 2767 (1990). As a result, otherwise useful information concerning innovative technology and services was not being brought to the public. Thus, the pioneer's preference rules are structured in such a way as to promote disclosure by requiring that the innovator report the details of his or her proposal through either experimental reports or a detailed technical showing of the feasibility of the proposal.

^{75/} In its 1992 pioneer's preference request, Omnipoint stated, "Omnipoint's microcell uses a *proprietary* technique to manage communications to the handsets. . . ." Omnipoint's Pioneer's Preference Request, PP-58 at 19 (May 4, 1993) (emphasis added). Similarly, Omnipoint's Reply Comments stated, "Through the use of a *proprietary* (continued...)"

Without this information, it is impossible for outside parties to fully understand the Omnipoint system, let alone to build upon Omnipoint's claimed developments. Furthermore, without this information, the Commission may well be unable to ensure compliance with the requirement that "each licensee must build a system that substantially uses the design and technologies upon which its preference award is based."^{76/} To grant a preference in this circumstance where the "innovator" has intentionally refused to reveal key elements of its technology flies in the face of the policies and goals underlying the pioneer's preference rules.

IV. THE COMMISSION APPLIED INCONSISTENT STANDARDS

Omnipoint's pioneer's preference request is apparently based on its development of "the first 1850-2200 MHz handheld phone."^{77/} In its pioneer preference request Omnipoint stated that "the most significant difference" characterizing its request from others was at that it has **"productized for delivery to experimental license holders** revolutionary spread spectrum wireless pocket phones and base stations."^{78/} Yet Omnipoint has done nothing more than adapt its cordless telephone to the 2 GHz PCS environment.^{79/} At the same time that the Commission granted Omnipoint a preference for work adapted from its 900 MHz cordless telephone, the Commission denied QUALCOMM's pioneer's preference application by finding that "most of the technical developments and patents associated with QUALCOMM's proposal were developed for implementation of its 800 MHz digital

^{75/} (...continued)

coding scheme. . . ." Omnipoint Reply Comments, GEN Docket No. 90-314 at 22 (June 25, 1992) (emphasis added). In addition, its May 1992 experimental report contains several pages that are marked "This figure withheld from public disclosure."

^{76/} *Third Report and Order* at ¶ 302.

^{77/} *Id.* at ¶ 51.

^{78/} Omnipoint Pioneer's Preference Request, PP-58 at 1 (May 4, 1992) (emphasis in original).

^{79/} There is no evidence that Omnipoint ever delivered anything other than 900 MHz equipment prior to the Commission's *Tentative Decision*. See discussion above at Parts II, A, 2, a through c. In addition, QUALCOMM's review of the experimental reports filed in this proceeding clearly shows that Omnipoint's 1800 MHz equipment has the same essential characteristics as its 902-928 MHz equipment.

cellular system."^{80/} Adapting this work to the 2 GHz system is not "innovative" according to the *Third Report and Order*.

Omnipoint itself characterizes its "pioneering" work as falling into three broad areas, the first of which is:

RF (*Radio Frequency Engineering*) and specifically spread spectrum product design, development, miniaturization and development.^{81/}

It is astounding that the Commission would, on the one hand, find that "transferring a technology from an existing service in a lower band to a 'new' service in a higher band" does not warrant a preference,^{82/} and then, on the other hand, award Omnipoint a preference for doing precisely that. By this trick of legerdemain the Commission has withheld from QUALCOMM what it deserves and awarded to Omnipoint what it does not.

It appears that the Commission has applied different criteria to the work of QUALCOMM and Omnipoint. The Commission denied QUALCOMM a preference because of its erroneous conclusion that it merely adapted earlier work but granted Omnipoint a preference for adapting its ISM band equipment to the PCS band. Nowhere in the *Third Report and Order* does the Commission reconcile this unequal treatment of the two companies. Whatever the reasoning behind the decision, the *Third Report and Order* affords dissimilar treatment to similarly situated parties.^{83/}

^{80/} *Third Report and Order* at ¶ 266.

^{81/} Omnipoint Pioneer's Preference Request, PP-58 at 11 (May 4, 1992). Interestingly, in the *Tentative Decision*, the Commission recited virtually verbatim the language of the Omnipoint request as justification for its conclusion that Omnipoint merited a pioneer's preference. This is decision-making in the "Why? Because they said so." school.

^{82/} *Review of the Pioneer's Preference Rules*, ET Docket No. 93-266, 8 FCC Rcd 7692, 7694 ¶ 17 (1993). QUALCOMM notes that no 800 MHz cellular service is being offered today using CDMA technology while there are several companies offering spread spectrum cordless telephones that operate in the unlicensed bands.


^{83/} The Commission also inconsistently applied its procedural standards. On August 30, 1993, the Commission denied QUALCOMM's request to submit supplemental comments because they were untimely filed. However, it accepted and used a September 29, 1993 unauthorized pleading from Omnipoint on the merits of its preference request, which pleading contained statements from Omnipoint's reply to QUALCOMM's rejected pleading.

V. CONCLUSION

QUALCOMM encourages the Commission to reconsider its *Third Report and Order* as detailed above.

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